IN THE

Supreme Court of the United States

No. 77-1810 OCTOBER TERM, 1978

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO

Appellees.

On Appeal From The Supreme Court of New Mexico

BRIEF OF AMICI CURIAE

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INTEREST OF AMICI CURIAE

The State of New York, the State of New Jersey, the State of Maryland, the State of Ohio and the Commonwealth of Virginia are vitally interested in this proceeding because it tests the validity of a scheme of taxing electric energy that is similar in practical effect to the taxing schemes of Pennsylvania and West Virginia. Projections by the Pennsylvania Joint State Government Commission indicate that a tax which the Commonwealth

of Pennsylvania seeks to impose on exported power will raise $21,486,000 in the first year of its operation from electric utilities with service districts in New York, New Jersey, Maryland, Ohio and Virginia. It must be anticipated that this tax will, through rate adjustments, be passed on to and borne by residents of those states. Similarly, West Virginia imposes a tax which, if valid, will fall exclusively on electric energy generated in that state and consumed in other states, including Ohio, Maryland and Virginia. The Pennsylvania tax and the West Virginia tax are similar in effect (though not in form) to the New Mexico Electrical Energy Tax and are currently under challenge in the courts of Pennsylvania and West Virginia.[1] The decision of this Court on the validity of the New Mexico tax may be thought to be controlling with respect to the Pennsylvania and West Virginia taxes.

[1] The Pennsylvania tax is being challenged in a case brought in the Pennsylvania Commonwealth Court, styled *Baltimore Gas and Electric Co. v. Lopus*, No. 643 Commonwealth Docket, 1978, while the West Virginia tax is under challenge in a case brought in the Circuit Court of Kanawha County, West Virginia, styled *Duquesne Light Co. v. State Tax Dep't of West Virginia*, Civil Action No. CA-78-1786.

SUMMARY OF ARGUMENT

1. Under the test of discrimination set forth in Section 2121(a) of the Tax Reform Act of 1976, the New Mexico Electrical Energy Tax is fatally discriminatory since it necessarily results in a tax burden on out-of-state consumers of exported electric energy greater than the burden falling on domestic consumers of electric energy.

2. Taxes on exported electric energy tend to provoke retaliation by states in which that energy is consumed and, contrary to the principle of federalism and to our nation's energy policy, place artificial geographical restraints on the availability of coal as an energy source.

3. The effect of a tax on exported electric energy is to subject that energy to double taxation, in violation of the Commerce Clause of the United States Constitution. New Mexico's attempt to tax the generation of electric energy for export must yield to the plenary taxing power of the states where the energy is consumed.

4. The New Mexico scheme of taxing electric energy, which extends to all energy consumed in New Mexico, regardless of where generated, as well as to energy generated in New Mexico and exported to surrounding states for consumption there, discriminates against interstate commerce in contravention of Section 2121(a) of the Tax Reform Act of 1976 and the Commerce Clause of the United States Constitution.

5. A tax on the generation of electric energy the burden of which, as with New Mexico's tax, falls on out-of-state consumers of that energy, is extraterritorial in its practical operation and violates the Due Process Clause of the Constitution.

ARGUMENT

I. New Mexico's Electrical Energy Tax is Prohibited by Section 2121(a) of the Tax Reform Act of 1976.

New Mexico is not alone in seeking to tax electric energy generated within the state for sale to consumers in other states. On December 21, 1977, the Governor of Pennsylvania signed Act No. 1977-100, P.L. 340, PA. STAT. ANN. tit. 72, § 8101(b)(2) (Purdon Supp. 1978) (quoted in full in Appendix G to the Jurisdictional Statement as Section 1101(b) of the Pennsylvania Tax Reform Code of 1971), which extended Pennsylvania's existing public utility gross receipts tax to reach sales made outside of Pennsylvania of electric energy produced in Pennsylvania. The amending language effects this extension by providing that "every electric light company . . . shall pay . . . a tax of 45 mills upon each dollar of the gross receipts of the corporation . . . received from: . . . the sales of electric energy produced in Pennsylvania and made outside of Pennsylvania. . . ." PA. STAT. ANN. tit. 72, § 8101(b)(2) (Purdon Supp. 1978).[2] Re-enacting existing law (a gross receipts tax on intrastate sales), Section 8101(b)(1) provides that the 45 mill tax is also imposed upon "the gross receipts of the corporation . . . received from . . . the sales of electric energy within this state. . . ." PA. STAT. ANN. tit. 72, § 8101(b)(1) (Purdon Supp. 1978) (quoted in full in Appendix G to the Jurisdictional Statement).

The effect of the Act No. 1977-100 extension of the Pennsylvania public utility gross receipts tax to sales of electric energy outside the state is similar to the effect of New Mexico's Electrical Energy Tax. Electric energy generated within the state for export is taxed, whereas generation for local consumption is not. While the sale of electricity to consumers within the state continues to be subject to tax, this tax is imposed only at the retail level

[2] Section 8101(b)(2) goes on to prescribe a formula for determining the amount of taxable out-of-state sales based on the relationship between the taxpayer utility's Pennsylvania expenses to its total expenses.

and is not conditioned on the generation of electricity within the taxing state.

Effective April 1, 1978, the State of West Virginia substantially amended its taxes imposed on electric utilities. First, the rate of tax on retail sales of electric energy within the state was reduced from 5.72% on sales for domestic and commercial lighting purposes (4.29% on sales for all other purposes) to 4%.[3] W. Va. Code § 11-13-2d (Supp. 1978). Second, the generation of electricity was eliminated from the broadly based manufacturers' privilege tax imposed at the rate of .88%. Third, a new tax was added which is imposed at the rate of 4% on every person engaged in the business of generating or producing electric power for sale "when the sale thereof is not subject to tax under section two-d of this article. . . ."[4] W. Va. Code § 11-13-2m (Supp. 1978).

As a result of these statutory changes, electric energy exported from West Virginia has been singled out and made the subject of a generation tax, whereas electric energy consumed in West Virginia is subject to a consumption tax not predicated on generation of the energy within the state. Thus, the effect of West Virginia's generation tax is similar to that of the taxes on exported power imposed by New Mexico and Pennsylvania.

The only substantial issue before this Court concerning the applicability of Section 2121(a) of the Federal Tax Reform Act of 1976[5], 15 U.S.C. § 391, is whether the

[3] Under the amended tax, sales in West Virginia by electric utilities which do not generate within the state are taxed at 3%. Sales to manufacturers consuming extremely large amounts of electricity are taxed at 2.46%. W. Va. Code § 11-13-2d (Supp. 1978).

[4] Under the statutory language, the 4% rate is to be applied "to the value of the electric power, as shown by the gross proceeds derived from the sale thereof . . . ." It is understood that, as administered, the tax is based on cost at the generation plant plus a rate of return.

[5] Section 2121(a) provides:

> No state, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

New Mexico Electrical Energy Tax is discriminatory within the meaning of that section.[6] The answer is clear. Not only the Electrical Energy Tax, but also Pennsylvania's Act No. 1977-100 and West Virginia's generation tax are discriminatory within the meaning of the section.

Discrimination under Section 2121(a) is not to be tested under existing Commerce Clause principles. In enacting Section 2121(a), Congress fashioned a new test to be met by any state seeking to tax electric energy generated within the state for transmission in interstate commerce. Accordingly, Congress set forth its own definition of "discriminatory" in the statute itself, there providing that:

> a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

Those to be protected from such discrimination are specified to be "out-of-state manufacturers, producers, wholesalers, retailers or consumers" of the exported electricity. A tax on exported electric energy inevitably increases the tax burden falling on consumers in other states. To the exporting utility's costs must be added New Mexico's, Pennsylvania's or West Virginia's tax, which cost is then passed on through rate adjustments to the exporting utility's out-of-state customers as an addition to the local tax burden already reflected in their rates. While the tax burden on out-of-state residents is thus increased, the tax

[6] Appellees' argument that, if applicable, Section 2121(a) is unconstitutional borders on the frivolous. In 1959, in response to this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), Congress enacted Pub. L. No. 86-272, 15 U.S.C. § 381, known as the Interstate Taxation of Income Act, which prohibits a state from levying a corporate net income tax on a corporation whose only activity within the state is the solicitation of orders (approved outside the state) for sales of tangible personal property. Pub. L. No. 86-272 was upheld by the Louisiana Supreme Court in *Int'l Shoe Co.* v. *Cocreham*, 246 La. 244, 164 S.2d 314 (1964) and certiorari was denied by this Court. 379 U.S. 902 (1964).

burden on in-state residents remains constant; they continue to bear the burden of only a single tax on consumption.

The discriminatory effect of a tax on exported electric energy can be seen most clearly in the case of the new tax imposed by Pennsylvania's Act No. 1977-100. That tax is imposed upon "each dollar of the gross receipts . . . received from . . . the sales of electricity produced in Pennsylvania and made outside of Pennsylvania. . . ." Accordingly, every out-of-state sale of electric energy generated in Pennsylvania and sold in, *inter alia,* New York, New Jersey, Maryland, Ohio or Virginia is taxed by Pennsylvania. At the same time, every such sale is also taxed by the state in which the sale is made.[7] On the other hand, electric energy sold in Pennsylvania is taxed only once, that is, by Pennsylvania. This proliferation of state taxes on exported power as distinct from power locally consumed is what Congress meant by "discriminatory" as used in section 2121(a).

While the New Mexico Electrical Energy Tax[8] is more subtly contrived than the Pennsylvania tax on exported power, its discriminatory effect is similar. On the face of the statute, the New Mexico Electrical Energy Tax is imposed evenhandedly on all persons generating electricity within New Mexico for sale. However, by reason of a credit allowed against a utility's New Mexico gross re-

[7] New York imposes a 3% tax on public utility gross receipts. N.Y. TAX LAW § 186-a (McKinney Supp. 1977); New Jersey, through a combination of taxes and surtaxes, subjects electric utilities to gross receipts taxes totaling 14.0625%. N.J. STAT. ANN. § 54:30A-54(a), (b) and (c) (West Supp. 1978); Maryland imposes a gross receipts tax on electric utilities at the rate of 2%. MD. ANN. CODE art. 81, § 130 (1975); Ohio's gross receipts tax on utilities is imposed at the rate of 4%. OHIO REV. CODE ANN. §§ 5727.38, 5727.81 (Page 1973); Virginia's gross receipts tax on electric utilities is imposed at 1⅛% on gross receipts up to $100,000, and 3½% on gross receipts in excess of $100,000, reducing gradually to 2% by 1983. VA. CODE § 58-603 (Supp. 1977). Virginia localities impose a sales/use tax on the residential consumption of electricity. New taxes on residential consumption may not exceed $3.00 per consumer per month. VA. CODE § 58-617.2 (1974).

[8] N.M. STAT. ANN. §§ 72-34-1 to 72-34-6 (Supp. 1975) (printed in full in Appendix D to the Jurisdictional Statement).

ceipts tax liability,[9] only power exported from New Mexico is actually subjected to the Electrical Energy Tax. Unlike the Pennsylvania tax, the New Mexico Electrical Energy Tax is based on kilowatt hours generated within the state rather than on sales of electricity outside the state. However, the effect is similar. In both cases (as in the case of West Virginia), the tax burden on exported electric energy is increased at the expense of out-of-state consumers, with no increase in the tax burden borne by consumers within the taxing state. This Court should not permit itself to be misled by the credit device employed by New Mexico in an attempt to disguise the discriminatory feature of its Electrical Energy Tax.

The language of Section 2121(a) is extremely broad: Discrimination results if a generation tax either "directly or indirectly" results in a "greater tax burden" on exported electric energy than on domestically consumed electric energy. Contrary to Appellees' assertion (Motion to Dismiss or Affirm at 10), there is no suggestion in this language that discrimination should be tested by looking only at the taxing state's scheme of taxing electricity. Had Congress wished to use this test, it would have done so. Instead it adopted a new, broader test which focuses on the disparity in tax burden between in-state and out-of-state consumers of electricity. During the Congressional debate on the Domenici amendment, which would have stricken Section 2121(a) from the Tax Reform Act of 1976, Senator Domenici of New Mexico stated:

> I submit that one might define discriminatory as one wishes. There is a disequal treatment in the final product here when we are all through. Groups of taxpayers are treated differently. I submit, Mr. President, that is not the kind of discrimination in terms of the imposition of a State tax structure by a State exercis-

[9] N.M. STAT. ANN. § 72-16A-16.1 (Supp. 1975) (printed in full in Appendix D to the Jurisdictional Statement).

ing its sovereign right. The fact that citizens from without and within are treated differently should not be the basis of defining it as discriminatory and thus illegal as this particular provision of the reform act that we have before us is going to do.

122 Cong. Rec. S12713 (daily ed. July 28, 1976). Senator Domenici thus recognized that Section 2121 would impose a new test of discrimination but he failed in his attempt to have the section stricken from the bill. What Congress intended by the word "discriminatory" as used in Section 2121(a) was precisely the different treatment of "citizens from without and within" which, as Senator Domenici recognized, the New Mexico scheme brings about. This may indeed be a new test of discrimination. It is nonetheless a valid test in the realm of state taxes on exported electric energy.

This Court need not decide at this time whether a truly evenhanded generation tax such as that involved in *Utah Power & Light Co.* v. *Pfost,* 286 U.S. 165 (1932), is banned by Section 2121(a). Such a tax is measured by generation within the taxing state and only within the taxing state, regardless of where the energy is consumed, and necessarily is borne in part by the local electorate. Such a tax does not operate as a consumption tax, nor is it coupled with a consumption tax.

In contrast, the schemes for taxing electric energy now operative in New Mexico, Pennsylvania and West Virginia are not evenhanded. This is most clearly visible in the case of Pennsylvania. Through its ongoing gross receipts tax on in-state retail sales of electric energy, Pennsylvania imposes a consumption tax on all electric energy consumed in Pennsylvania, even that which has been generated in other states and imported into Pennsylvania.[10] Being a consumption tax, this tax is imposed only at the retail

[10] Amici understand that in 1977, more than 13.9 billion kilowatt hours of electric energy consumed in Pennsylvania were derived from out-of-state sources.

level. Wholesale sales of electric energy intended for ultimate consumption in Pennsylvania are tax free.

On this traditional matrix of taxing electric energy, Pennsylvania has now superimposed a tax on electric energy generated in Pennsylvania and sold elsewhere, either at wholesale or at retail. Quite apart from the obvious constitutional deficiencies, this overall scheme of taxing electric energy is inherently overreaching. Not only does Pennsylvania tax the entire field of electric energy consumed within the state regardless of where that energy is generated, but, not content with having exhausted the taxing of consumption, Pennsylvania seeks to reach out and tax energy generated within the state and consumed elsewhere. In so doing, Pennsylvania seeks to tax more than the whole electric energy pie—necessarily at the expense of consumers in surrounding states on whom the burden of the export tax must ultimately fall. If this scheme of taxation is not "discriminatory" within the meaning of Section 2121(a), then the enactment of that provision by Congress was an idle gesture.

The same vice is inherent in the New Mexico and West Virginia schemes for the taxation of electric energy, only (through the allowance of a credit against the gross receipts tax in the one case and an exclusion from the generation tax in the other) in disguised form. It is true that New Mexico, unlike West Virginia and Pennsylvania, purports to allow a credit against its gross receipts tax for any generation tax paid to another state. However, to assert that this credit saves the New Mexico Electrical Energy Tax from the charge of discrimination begs the question since taxes on the generation of electric energy for export are a rarity and their validity in the light of Section 2121(a) is what is at issue in this and other litigation.

One of the evils which Congress perceived and took steps to prevent in enacting Section 2121(a) of the Tax Reform Act of 1976 is clearly illustrated by reference to the reaction of bordering states to the enactment of the

Pennsylvania tax on exported electric energy. On February 3, 1978, Governor Carey of New York disapproved the renewal of a Pennsylvania-based electric cooperative's entitlement of power from the Niagara Power Project, giving as his reason the fact that the cost of electricity to New York consumers had been increased by Pennsylvania's new tax on exported power.[11] Also, on June 22, 1978, a bill[12] was introduced in the New Jersey General Assembly which would mirror Pennsylvania's Act No. 1977-100 by imposing a tax on electric energy generated in New Jersey and sold outside the state. The tax would remain in effect by its terms only so long as Act No. 1977-100 remains in effect. These retaliatory acts of New York and New Jersey bear out Senator Fannin's remarks on the floor of the Senate concerning the evils inherent in a tax on exported electric energy:

> We are talking about what could happen all over the United States. We are talking about a potential taxing war on the sale of power which could be devastating.

122 Cong. Rec. S12713 (daily ed. July 28, 1976).

It is significant, in weighing the intent of Congress, that New Mexico's Electrical Energy Tax, Pennsylvania's Act No. 1977-100, and West Virginia's generation tax are directly contrary to the nation's energy policy as recently codified in the Powerplant and Industrial Fuel Use Act of 1978, Act of November 9, 1978, Pub. L. No. 95-620. [Nov. 9, 1978] Daily Tax Report (BNA) (No. 218 at G-3)[13].

[11] See Brief of Amici Curiae in Support of Jurisdictional Statement at 2-3.

[12] Bill No. 1525, now in the Taxation Committee of the New Jersey General Assembly, printed as Appendix B to Brief of Amici Curiae in Support of Jurisdictional Statement.

[13] Signed by the President on November 9, 1978, Pub. L. No. 95-620, dealing with the conversion of electric utilities to coal as a source of fuel, is one portion of the Administration's five-part energy plan, the other portions of which are Pub. L. No. 95-617 providing for utility rate reform, Pub. L. No. 95-618 providing for certain tax incentives to energy conservation, Pub. L. No. 95-619 dealing generally with energy conservation and Pub. L. No. 95-621 involving natural gas pricing. [Nov. 9, 1978] Daily Tax Report (BNA) (No. 218 at G-3).

Included in section 102(a) of the Act is the following finding:

> The protection of public health and welfare, the preservation of national security, and the regulation of interstate commerce require the establishment of a program for the expanded use, consistent with applicable environmental requirements, of coal and other alternate fuels as primary energy sources for existing and new electric powerplants and major fuel-burning installations; . . .

Pub. L. No. 95-620, § 102(a)(1) (*as printed in* Conf. Rep. No. 95-988, 95th Cong., 2d Sess. 3 (1978)). Expanding on the term "other alternate fuels," section 102(b) provides that one of the purposes of the Act is

> to encourage and foster the greater use of coal and other alternate fuels, in lieu of natural gas and petroleum, as a primary energy source.

Pub. L. No. 95-620 § 102(b)(3) (*as printed in* Conf. Rep. No. 95-988, 95th Cong., 2d Sess. 4 (1978)).

New Mexico, Pennsylvania and West Virginia have abundant coal resources, and, because of the economies involved in constructing power plants near the fuel source, this has been an important motivating factor in the siting of coal-fired generating facilities in these states.[14] Increasing use of these coal resources for the benefit of people in large areas of the country is in line with the national energy policy as just described. The taxes on exported electric energy, which New Mexico, Pennsylvania

[14] Senator Goldwater described the four corners area of New Mexico as a location where "there are vast deposits of very deep shale that can literally be bulldozed into the furnaces which in turn run the generating plant to create electricity." 122 Cong. Rec. S12715-6 (daily ed. July 28, 1976). Many of the out-of-state utilities generating in Pennsylvania and West Virginia do so as joint owners of so-called mine mouth plants located directly adjacent to coal mines.

and West Virginia seek to impose, inhibit the realization of this objective. Obviously, the host states must have the power to tax these major coal facilities, but the tax burden must be felt by the local electorate, too— anything less has been proscribed by Congress in the interest of the nation as a whole. While it would be disingenuous to suggest that at their present rates these taxes will drive out-of-state utilities from the taxing states, it must be recognized that these taxes on exported energy operate *pro tanto* to discourage the entry of out-of-state utilities and the use of the coal resources of these three states for the benefit of the people of the entire region. Depending on future tax rates, today's discouragement may become tomorrow's prohibition.

II. New Mexico's Electrical Energy Tax Violates the Commerce Clause of the United States Constitution.

The effect of New Mexico's Electrical Energy Tax, like Pennsylvania's Act No. 1977-100 and West Virginia's generation tax, is to discriminate against interstate commerce in violation of the Commerce Clause of the Constitution of the United States. Such discrimination exists because these taxes are imposed only on electric energy moving in interstate commerce[15] and their imposition necessarily results in a cumulative tax burden on such commerce.

While multiple taxation is most blatant in the case of the Pennsylvania tax, it is equally present with the taxes of the other two states. The Pennsylvania tax, as extended by Act No. 1977-100, is on sales of electric energy outside of Pennsylvania. Since every other state in which Pennsylvania-generated electric power is sold has its own gross receipts tax on retail sales of electric energy

[15] Expressly, in the case of the Pennsylvania tax; in practical effect in the case of the New Mexico and West Virginia taxes.

within the state,[16] every sale of power generated in Pennsylvania and exported for consumption in another state is subject to a sales tax both by Pennsylvania and by the state in which the sale occurs.

By in effect exempting, through the credit device, electric energy consumed within the state and subjected to the New Mexico Gross Receipts Tax, the Electrical Energy Tax now imposed by that state, necessarily falls only on energy exported out of the state. The record indicates that the destination states also impose taxes on electric energy,[17] with the result that energy exported from New Mexico is double taxed.

Similarly, the West Virginia generation tax, excluding as it does energy consumed within the state, falls only on energy exported out of West Virginia. All of the states bordering West Virginia impose gross receipts taxes or sales taxes on electric energy consumed within their borders, regardless of where generated.[18] Again, double taxation of exported energy results.

[16] New York: 3%, N.Y. TAX LAW § 186--a (McKinney Supp. 1977); New Jersey: 14.0625%, N.J. STAT. ANN. § 54:30A-54(a), (b) and (c) (West Supp. 1978); Maryland: 2%, MD. ANN. CODE art. 81, § 130 (1975); Ohio: 4%, OHIO REV. CODE ANN. §§ 5727.38, 5727.81 (Page 1973); Delaware: 5%, DEL. CODE tit. 30, § 5502 (1974); District of Columbia: 6%, D.C. CODE § 47-1701 (West Supp. 1978); Virginia: 1⅛% on gross receipts up to $100,000 and 3½% on gross receipts in excess of $100,000, reducing gradually to 2% by 1983, VA. CODE § 58-603 (Supp. 1977); Virginia localities impose a sales/use tax on the residential consumption of electricity. New taxes on residential consumption may not exceed $3 per consumer per month. VA. CODE § 58-617.2 (1974); W. Va.: 4%, W. VA. CODE § 11-13-2d (Supp. 1978).

[17] In 1975, the Appellants paid a total of $13,615,965 to state and local jurisdictions where electric energy generated in New Mexico and subjected to the Electrical Energy Tax was consumed. Appellants' Brief-in-Chief in the New Mexico Supreme Court at 25.

[18] States bordering West Virginia impose upon electric utilities the following gross receipts taxes on intrastate sales: Maryland: 2%, MD. ANN. CODE art. 81, § 130 (1975); Ohio: 4%, OHIO REV. CODE ANN. §§ 5727.38, 5727.81 (Page 1973); Pennsylvania: 4.5%, PA. STAT. ANN. tit. 72, § 8101(b)(1) (Purdon Supp. 1978); Virginia: 1⅛% on gross receipts up to $100,000 and 3½% on gross receipts in excess of $100,000, reducing gradually to 2% by 1983, VA. CODE § 58-603 (Supp. 1977). Virginia localities impose a sales/use tax on the residential consumption of electricity. New taxes on residential consumption may not exceed $3 per consumer per month. VA. CODE § 58-617.2 (1974). Kentucky imposes a 5% sales tax on the consumer of electricity measured by the sale price of the electricity, KY. REV. STAT. §§ 139.200, 139.210 (1971).

This Court has noted the unique risk of multiple taxation of interstate commerce presented by a gross receipts tax. *General Motors Corp.* v. *Washington,* 377 U.S. 436, 440 (1964); *United States Glue Co.* v. *Town of Oak Creek,* 247 U.S. 321, 328-29 (1918). In invalidating New Mexico's Gross Receipts Tax as it applied to the sale of instructional materials produced in New Mexico and sold outside the state, the Court stated: "a tax levied on the gross receipts from the sales of tangible personal property in another State is an impermissible burden on commerce." *Evco* v. *Jones,* 409 U.S. 91, 93 (1972). Using similar language, the Court struck down the Indiana Gross Income Tax as applied to sales of goods manufactured in Indiana but sold outside the state:

> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.

J. D. Adams Manufacturing Co. v. *Storen,* 304 U.S. 307, 311 (1938). *See also Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434, 439 (1939).

This risk of multiple taxation is not limited to gross receipts taxes but has also been recognized by this Court to exist with taxes closely analogous to the New Mexico Electrical Energy Tax and the West Virginia generation tax. As pointed out by Appellants in their Jurisdictional Statement at 21, the Electrical Energy Tax is similar to the Texas tax on "gathering gas" involved in *Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157 (1954). That tax was not measured by gross receipts from out-of-state sales but rather by the value of the gas at the point of transfer from the producer to the pipeline company at a point in-state. Noting that the state of distribution might impose a similar tax on the gas when it was "unloaded" from the interstate pipeline, this Court found the Texas tax offensive under the Commerce Clause and struck it down.

Accordingly, the fact that the New Mexico and West Virginia taxes on exported electric energy are generation taxes whereas the taxes imposed by the surrounding states are gross receipts taxes does not change the result under the Commerce Clause. With the overruling of *Spector Motor Service* v. *O'Connor,* 340 U.S. 602 (1951), in *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977), this Court swept away the last vestige of formalism in the field of state taxation of interstate commerce.[19] The validity of a state tax under the Commerce Clause must now be tested not by the name of the tax but rather by its practical economic effect. A generation tax on exported electric energy results in double taxation of that energy just as fully as does a gross receipts tax.

While not yet articulated as a rule of law, it is clear from this Court's decisions that where a threat of double taxation exists, it is the tax of the state where the commodity originates that must give way to a tax of the state of destination. Thus, in *Evco* v. *Jones,* 409 U.S. 91 (1972), New Mexico was prohibited from imposing its gross receipts tax on instructional materials sold outside the state. In *J. D. Adams Manufacturing Co.* v. *Storen,* 304 U.S. 307 (1938), Indiana was prohibited from imposing its gross receipts tax upon receipts from sales outside the state. A similar result was reached in *Michigan-*

[19] It should be noted that *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977), throws serious doubt on the continuing validity of *American Mfg. Co.* v. *City of St. Louis,* 250 U.S. 459 (1919).

Wisconsin Pipe Line Co. v. *Calvert,* 347 U.S. 157 (1954): The tax imposed by the state of origin was struck down.

On the other hand, recent decisions of this Court have given wide latitude to the taxing power of the state of destination. In both *General Motors Corp.* v. *Washington,* 377 U.S. 436 (1964), and *Standard Pressed Steel Co.* v. *Washington,* 419 U.S. 560 (1975), the Washington gross receipts tax was upheld as applied to the unapportioned gross receipts of out-of-state taxpayers making sales in the State of Washington.[20]

This trend, so clearly discernible in this Court's recent decisions, to favor taxes imposed by the destination state against those imposed by the state of origin, is demonstrably sound. The bill which was to become the New Mexico Electrical Energy Tax was sponsored in the New Mexico House by Representative Lopez, who in his opening remarks stated:

> I find myself in the unique position this year, Mr. Speaker, of having to support a measure of this nature. As you all know, for the last four years, I've stood up in opposition to the imposition of this sort of tax. But my opposition was based on the fact that there was no way to impose the tax without placing a burden on the New Mexico taxpayer or utility user. However, this year a device has been worked out whereby there is a credit in it and the tax will be paid by out-of-state residents with no additional burden on our New Mexico residents.

122 Cong. Rec. S12714 (daily ed. July 28, 1976).

[20] The trend to allow the destination state to tax a commodity and to prohibit the state of origin from doing so has been noted by commentators. *See e.g.,* Walter Hellerstein, *State Taxation of Interstate Business and the Supreme Court, 1974 Term: Standard Pressed Steel and Colonial Pipe Line,* 62 Va. L. Rev. 149, 171 (1976); Richard J. Krol, *Impact of Supreme Court's National Geographic case on use-tax collection responsibilities,* 47 J. of Tax. 44 (July, 1977). *See also* Justice Rutledge's concurring opinion in *Internat'l Harvester Co.* v. *Dep't of Treasury,* 322 U.S. 340, 360-1 (1944) and his concurring opinion in *Freeman* v. *Hewit,* 329 U.S. 249, 278-80 (1946).

In the same vein, Representative Mebus of Pennsylvania, in debate on the bill which would become Pennsylvania Act No. 1977-100, stated on the floor of the Pennsylvania House of Representatives:

> Mr. Speaker, at first blush this bill appears to be an ideal tax bill for it affects no Pennsylvanians. It passed the Senate by a vote, I believe, of 48 to nothing. The taxes to be collected are to be paid by the utility companies of Ohio and New York, New Jersey, Delaware, Maryland, Virginia and West Virginia, or by their consumers by means of a pass-through.

Record of Pennsylvania House of Representatives, December 13, 1977, 3rd Consideration of S.B. 782.

The New Mexico tax raises approximately $5,000,000 annually from out-of-state utilities,[21] while Pennsylvania Act No. 1977-100, according to the Pennsylvania Joint State Government Commission, would raise at least $23,000,000 from out-of-state utilities in its first year of operation.[22] The politically inviting tactic of exporting taxes of this magnitude and imposing them solely on taxpayers who have no voice in the taxing state's legislative processes should be nipped in the bud.

The New Mexico Electrical Energy Tax, like Pennsylvania's Act No. 1977-100 and West Virginia's generation tax, also violates the Commerce Clause in that it discriminates against electric energy exported from the state in favor of energy consumed in the state. Energy consumed in New Mexico is taxed only at the consumption (retail) level, whereas exported energy is subjected to tax whether the exporting utility sells it at wholesale or retail.[23]

[21] 122 Cong. Rec. S12716 (daily ed. July 28, 1976).

[22] Approximately $21,486,000 of that $23,000,000 would be paid by utilities having their service districts in New York, New Jersey, Maryland, Ohio and Virginia.

[23] While present with the New Mexico and West Virginia taxes, this vice is most clearly apparent in Pennsylvania's electric energy tax scheme; the Pennsylvania Legislature has blatantly coupled a sales tax on *all* out-of-state sales of energy generated in Pennsylvania with a sales tax on *retail* sales made within Pennsylvania.

In *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64 (1963), this Court struck down the Louisiana Use Tax on the ground that certain transactions involving the importation of goods into the state were taxed more heavily under the use tax than they would have been under the sales tax, or in certain cases were subject to the use tax and would not have been subjected to the sales tax. The Court stated:

> The conclusion is inescapable: Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.

Id. at 70.

New Mexico, Pennsylvania and West Virginia seek to have the best of both worlds. Through their gross receipts taxes on local retail sales they tax fully on a destination basis, reaching electric energy generated in other states and imported into the taxing jurisdiction as well as electricity generated and consumed locally. In addition, they now seek to tax electric energy generated locally but destined for transmission in interstate commerce and consumption elsewhere. Such a scheme of taxation is, as pointed out in an earlier section of this brief, inherently overreaching. It is precluded not only by section 2121(a) of the Tax Reform Act of 1976, but by the Constitution through the Commerce Clause.

In upholding the New Mexico Electrical Energy Tax, the Supreme Court of that state attached significance to its finding that the tax was enacted to deal with the environmental and socio-economic problems caused by out-of-state utilities generating in New Mexico (Opinion of New Mexico Supreme Court, printed at 3b of the Jurisdictional Statement). One may sympathize with New Mexico's desire to protect its environment, but taxing out-of-state interests alone is not a constitutionally permissible method

of doing so. By reason of the credit feature in the New Mexico Gross Receipts Tax, only out-of-state utilities and their customers are forced to pay the Electrical Energy Tax and thus to bear the cost of preserving New Mexico's environment.

Analogous situations may be found in non-tax cases involving attempts by the states to protect their resources and environment from outsiders. Long before the increased use of coal was adopted as a national energy policy, this Court struck down an Oklahoma statute which attempted to retain natural gas within the state. The Court stated:

> Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sales by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we

have said that "in matters of foreign and interstate commerce there are no state lines."

West v. *Kansas Natural Gas Co.,* 221 U.S. 229, 255 (1911). *See also Pennsylvania* v. *West Virginia,* 262 U.S. 553, 595-600 (1923). New Mexico's Electrical Energy Tax is offensive for the same reason. Inevitably it discourages out-of-state utilities from locating their generating plants within New Mexico, thereby conserving New Mexico's coal resources to produce low cost electricity for New Mexico residents.

III. New Mexico's Electrical Energy Tax Is Invalid under the Due Process Clause of the United States Constitution.

It is well settled that the Due Process Clause of the United States Constitution prevents a state from taxing transactions occurring beyond its borders. Thus, in *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965), this Court invalidated the application of the Idaho Motor Fuels Tax to an oil company making sales outside Idaho. To similar effect is *Miller Brothers Co.* v. *Maryland,* 347 U.S. 340 (1954).

Pennsylvania's Act No. 1977-100, insofar as it attempts to tax sales of electric energy outside of Pennsylvania, is the clearest form of extraterritorial taxation banned by the Due Process Clause. While the extraterritorial effect of the New Mexico Electrical Energy Tax and the West Virginia generation tax is not so blatant, in economic reality all three of these taxes have the same effect. Each tax falls squarely on exported electric energy and the burden of the tax, like the energy itself, is exported and falls on out-of-state consumers.

CONCLUSION

Section 2121(a) and its constitutional underpinnings present this Court with the opportunity of discouraging the enactment of discriminatory taxing schemes on exported electric energy. While such discrimination clearly violates Section 2121(a) and the Constitution and should be struck down for that reason alone, the evil in the discrimination is particularly apparent in an era of increasing energy shortages. A broad invalidation of New Mexico's Electrical Energy Tax will further the nation's attempt to fairly and economically allocate scarce energy resources to the places where they are needed, without regard to state lines.

For the foregoing reasons, the judgment of the Supreme Court of New Mexico should be reversed.

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